UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

INTERNATIONAL LONGSHOREMEN'S AFL-CIO, et al.,

Defendants.

: 05-CV-3212 (ILG)

: November 19, 2007

: 225 Cadman Plaza
: Brooklyn, New York

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TRANSCRIPT OF CIVIL CAUSE FOR HEARING ON MOTIONS
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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For Management-ILA: DONATO CARUSO, ESQ.

For John Bowers: JOHN WING, ESQ.

(Appearances continue on next page.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPEARANCES (Continued):

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Proceedings recorded by electronic sound recording, transcript produced by transcription service

(Proceedings began at 3:30 p.m.)

THE CLERK: Civil cause for a status conference, CV-05-3212, United States of America v. International Longshoremen's, et al., Magistrate Judge Pohorelsky presiding.

THE COURT: Good afternoon. Sorry to keep you waiting. There have been some significant developments as everybody is aware in this case which it strikes me renders the motion for protective order moot. It seems to me that at this point the defendants don't care about getting that information. Am I right?

MALE VOICE: At this point, Your Honor, that's correct.

THE COURT: So why do I need to decide it? I mean the case -- if the case is resurrected by an amended complaint that Judge -- Glasser, pardon me. It's been a long day. Glasser. That Judge Glasser finds sufficient then the plaintiff -- the defendant is going to be interested in the information then I've got to decide it but unless -- until that happens I don't have to decide it and I'll be honest with you, I've got other things to do. So does anybody disagree with that?

MR. HAYES: Your Honor, Chief Justice -- Richard Hayes for the United States, Your Honor. It's been a long day for all of us. Of course the United States has recognized that there has been a change in the procedural posture of this case since our last conference. The United States does anticipate currently consistent with Judge Glasser's November 1 order filing an amended complaint and certainly within the time frame directed by Judge Glasser in his order. At such time the United States anticipates that it would once again be necessary or perhaps the United States is incorrect in its assumption, but anticipates that it would once again be seeking a protective order with respect to the Department of Labor EPSA documents and the United States of course would not disagree with the Court's suggestion that at least at this point the matter is either moot or not yet ripe depending upon how one looks at things.

There is also, Your Honor, the pending application, and of course Your Honor is going to get to this but if I may, the pending application with respect to the deposition of John Bowers. The United States respectfully suggests that that is perhaps of a different --

THE COURT: That's why I didn't include both applications in the mootness question -- I mean on the mootness -- in the mootness category because it's not entirely moot in light of the fact that you intend to file an amended complaint.

I think it does change the calculus though about -- nobody -- I'll ask you to address that, whether you think it does and if so how. Since it's the Government's application --

it's probably quicker for me to ask the defendants.

Let's accept for the moment that it's not entirely moot because there's at least a possibility the case would proceed and even in the absence of a complaint a party can seek depositions to perpetuate testimony. Here we're in a slightly different position. I mean we're in a position where we say in between complaints. So how should it change the calculus, if at all, and does it change any of your arguments? Because all of you submitted arguments on this point before the motion to dismiss was granted.

[Mr. Wing away from microphone and inaudible at times.]

MR. WING: That is correct, Your Honor. John Wing for Mr. Bowers. [Inaudible] changes are arguments in this respect and that is all of our arguments were premised on the fact that if the complaint was dismissed there was no need for a deposition. We actually still believe that notwithstanding the Government's stated intention to file a new complaint and it's because there are many things that may happen between now and when we get this complaint that we see no reason for the Court to consider his application today.

First of all, Your Honor, we have every intention to try and dissuade the Government that at least filing a new complaint against John Bowers would be an additional waste of their time and energies and resources. Mr. Goldstein had written a letter to Mr. Hayes requesting an opportunity to meet with him and discuss that issue. I intend to do the exactly the same. Mr. Hayes advised Mr. Goldstein today that he wasn't -- that there wasn't going to be any meeting at least in his office but Mr. Goldstein has asked -- not just asked but plaintiffs to go down and talk with the people in the Department of Justice about this issue and this case and we have every intention of doing the same.

There's another thing [inaudible] that Your Honor may not be aware of and that is when this case was brought Mr. Bowers was the president of the ILA and there was an effort by the Government to relieve him of that position. He retired from that position last July. He is now what they call president of [inaudible] but [inaudible] position within the ILA and that is a changed circumstance that I think will at least interest -- might decide that this case should not be [inaudible].

In addition, although there's no way to argue the facts of the case [inaudible] Court, the fact of the matter is, Judge, we really believe and for reasons that were set forth in a motion [inaudible], that there is no case against John Bowers and you may know from [inaudible] so far that they did bring essentially this case. They've added on some stuff but they did bring essentially this case in a criminal [inaudible] and everybody got acquitted except [inaudible] who pleaded and then got a probationary sentence. Everybody got acquitted, we would submit, [inaudible] substantial case here.

Mr. Bowers in that criminal matter he was not named as a defendant. He was actually and it's been stated by the Government on more than one occasion, a victim of a primary allegation [inaudible]. Judge Glasser's opinion as Your Honor probably knows refer to the somewhat [inaudible] defendant's [inaudible] victim [inaudible] participant [inaudible].

Moreover, Your Honor, I think we should -- it would make sense if we wait and see what is in this complaint which we assume will be somewhat different from the last one. But we don't know now who the defendants will be in that complaint. We don't know now what the allegations will be in that complaint. Certainly there were comments made by Judge Glasser in both the oral argument and in his written opinion suggesting that much of what was in the original complaint would be subject to a Rule 12(f) motion to strike because it was irrelevant and immaterial. I don't know how you would go about having a deposition take place before you know what would properly be the subject of questioning at such a deposition. Certainly now I don't think we know that.

On top of everything else, Judge, it's been stated in the papers on every application the Government has made to do this [inaudible] position that to do this deposition would be enormously expensive not just for Mr. Bowers but for all of the nominal defendants who to some degree have been referred to as really the victims of the alleged illegal conduct. We're not talking about petty change. We're talking about probably a minimum of three weeks of depositions with expenses probably running [inaudible] thousands of dollars per defendant. While it may mean nothing to the Government, certainly they're not focused on what it's costing the Government or the taxpayers, it does mean a lot to private individuals.

For all of those reasons, Judge, I would respectfully suggest that since we don't have a case yet that if the Government wants to makes an application to take this deposition that they make it down the line after we have not only seen the complaint and seen what's in it but determine what the proper things would be with respect to the complaint which from my standpoint may very well be subject to another motion to dismiss on additional grounds but I can't say that without having actually seen the complaint.

MR. GOLDSTEIN: Your Honor, Howard Goldstein speaking for the International Longshoremen's Association.

Your Honor, I won't repeat what we said in our submission before Judge Glasser's decision, but in Judge Glasser's decision, decisions including his decision on the stay issue he made a couple of things very clear. One was his concern for the expense that the nominal defendants would be put to in discovery and the second thing he made clear was that significant changes have to be made to the complaint if it's going to be sustained.

As Mr. Wing just alluded to, we also made mention to some of the allegations particularly going to the lengthy history lesson that was in the complaint and seriously questioned the relevance of that.

Until the Government files its complaint we don't know what the shape of this case is and what the shape of discovery should be. Yes, we could theoretically take discovery on the old complaint and everything that's in it but that would trigger the expense concerns that Judge Glasser was concerned about and that we are very concerned about. Until we know what this complaint looks like it doesn't make sense for the lawyers to prepare for a deposition and to take a deposition because the only deposition that's possible is the most broad ranging deposition and the most expensive deposition to cover our basis.

We also don't know who the defendants are. Since the filing -- the ILA had its annual -- its quadrennial, every four years convention in July. A number of the nominal defendants, a number of the individuals retired at that time. They're in this case solely because of their position as ILA vice presidents. There are new vice presidents who are going to be in their place. Maybe the Government will include those people; maybe they won't but we don't even know who the defendants are going to be in this case. Those defendants would have a right at a deposition if defendants are added, those defendants have a right to participate in the deposition and some period of time for preparation in terms of reviewing some of the material that's already been produced. So for a lot of reasons until we have a complaint it really doesn't make sense to go forward in our view.

I also wanted to just repeat what Mr. Wing just said. I've always believed that it was neither wise as a legal matter or a policy matter to bring this case against the International. I sought an opportunity with the Eastern District before this case was filed originally, convinced them of that. They did not grant me the courtesy of an interview or a meeting. The head of the racketeering section in the Department of Justice did grant me that courtesy although obviously he authorized or the Justice Department authorized going forward again.

Anticipating that I might not get a meeting with Mr. Hayes or the U.S. Attorney which I've requested, I also advised Mr. Hayes in that letter that I would be separately requesting a meeting with the Justice Department and that same day I sent -- or I believe it was the next morning I sent a letter to the head of the racketeering section in Justice enclosing my letter to Mr. Hayes so that he knew that we were seeking to speak to the Eastern District first and requesting a meeting with him before the Justice Department made a final decision.

I'd like the opportunity to have that meeting. I think I will get it with Washington. They granted it to me before and I'd like to have the opportunity to try to convince the Justice Department why so many years after the events that underlie this complaint and so many years after the ILA has taken remedial steps on its own why this case should not be brought. And for all of those reasons I think we should at least wait until we see what we have to deal with, whether the Justice Department authorizes going forward and see what the content of a complaint is before we start the very expensive process of preparing for and taking a deposition.

THE COURT: Anybody else want --

MR. CARUSO: If I may, Your Honor. MILA would like to have a little bit of a say, Your Honor. I think when you look at that decision there's --

THE COURT: At that decision --

MR. CARUSO: -- at that decision by Judge Glasser that there is a clear and unmistakable indication that MILA should not be in this case and until the Government files an amended complaint obviously we don't think that fun money should be expended in what could be a very long and arduous deposition that could be very costly certainly for MILA when MILA may not be in this case come the amended complaint.

The Government actually controls the timing because I know they indicated that they're going to file that amended complaint within the period of time set forth in Judge Glasser's order but if they want to really move forward quickly they can always file that amended complaint well before that due date and at least give individual nominal defendants like MILA the opportunity to know whether they're in this case or not so they don't have to expend money foolishly.

THE CLERK: Your Honor, that was Mr. Caruso speaking I believe; right?

MR. CARUSO: That is correct.

MR. ROCCO: This is Victor Rocco for the Metro Funds and MMMCA, Your Honor. Lest my silence be construed against me I join in virtually everything that's been said.

THE COURT: Having received objections from virtually all of the defendants, I am -- I don't think you're in danger of having your silence construed --

MR. ROCCO: I didn't think so.

THE COURT: I didn't think that the granting of the motion to dismiss had changed your view on the --

MR. ROCCO: It hasn't, Judge, and the only additional dimension -- in fact, Mr. Caruso covered it, is that we represent pension funds and benefit funds. We certainly don't want to be put to the expense of what in effect at this point is going to be a very, very unfocused marathon deposition of Mr. Bowers. It will be enormously expensive. I think that Mr. Wing is being conservative in what he's estimating the cost of each defendant will be here. Thank you, Judge.

MR. CUNHA: If I may, Your Honor. I'm not going to address --

THE COURT: Mr. Cunha.

MR. CUNHA: Yes, Your Honor. I'm not going to address what are obviously very stark disagreements with counsel for the defendants regarding the underlying merits of the action or what may come or may not come from hypothetical discussions that counsel would like to have with various people in Washington. It is, as Mr. Hayes has indicated, the present intention of the United States to file an amended complaint. At this point we have not made nor do we anticipate making a Rule 27 application to perpetuate Mr. Bowers testimony in advance of that amended complaint. But we do think that we should be in a position -- and to some extent this is under the control of the defendants, once we file that amended complaint to proceed with the deposition.

Now, obviously if the defendants will no longer be seeking or will not seek a new stay of discovery at the time we file that complaint, the issue is largely moot. They'll proceed with the deposition at that time if as I suspect --

THE COURT: I think you should assume that the stay of discovery will remain in place. I would consider it still in place by Judge Glasser's order. I would not think that the dismissal and the filing of a new complaint would have lifted, acted to lift the stay.

MR. CUNHA: Well, in that case our position would certainly be that we would continue to seek the deposition of Mr. Bowers at that time. I think there are a couple of things that bear emphasis. Although there's been mention about the change in administration at the ILA, the fact remains that Mr. Bowers is still the president in Meritus, a position for which he remains well compensated, and the body of knowledge that he has regarding the subject matter of this litigation is unchanged regardless of his title. So I think the fact that we would be seeking to take his deposition is wholly unaltered by any changes that may have taken place in the administration of the ILA.

Now, in terms of how best to proceed, I think it would be counterproductive and duplicative for us at this point to make a new application once the amended complaint is filed. What we would prefer is to have the Court in a position to rule on that application once the amended complaint has been put before the Court. I think that would save everyone time and it would allow us to have access to Mr. Bowers testimony at the earliest possible opportunity.

I think that there's another point here that bears emphasis in that counsel both in their opposition papers and today have made reference to the expense of this and the fact that Judge Glasser's earlier orders clearly recognize the danger that this expense would pose. Well, Judge Glasser's order also clearly recognized that there was an exception for instances in which testimony could potentially be lost, and that is the reason that we have sought to depose Mr. Bowers whose age is quite advanced and like all of us grows more advanced by the day and accordingly we don't feel that the expense alone is something that exempts Mr. Bowers deposition from the scope of Judge Glasser's order.

Now, how the Court wants to proceed, whether the Court wants to hear argument in full on this today or at later time, we leave that to Your Honor but we believe that this -- the posture of the application should be such that once an amended complaint is filed this can be adjudicated at the earliest possible opportunity so that Mr. Bowers and all other defendants who are in the case at that time can have the opportunity to go forward with the deposition expeditiously.

THE COURT: I probably should have you asked you first whether this changed things because what -- all I'm hearing is that you're asking to hold the motion in abeyance.

MR. CUNHA: Essentially yes, Your Honor.

THE COURT: And the -- until we see -- until you file the amended complaint and you -- and the Court has a better idea I suppose of a) what will be in the complaint, what the scope of relevant testimony would be based on the claims in the complaint, who the defendants will be so that the question of costs will be better framed, and -- I don't know. Basically I don't know if what you're saying is you're withdrawing your motion but with clear notice that you're going to seek a ruling as soon as the amended complaint is filed. Is that the posture we're in? Because if you're not withdrawing the motion then what do I do, just not rule? Is that what you're --

MR. CUNHA: Well, I think Your Honor can hold the motion in abeyance for the remaining period of time in which we have to amend. We would certainly not be withdrawing the application. I think it would be counterproductive and indeed would engender unnecessary expense to have us make an entirely new application which would essentially be a carbon copy of the last one and for defendants to oppose it.

THE COURT: Right. For defendants to do anything -- well, what's the reaction of defendants?

[Mr. Wing away from microphone.]

MR. WING: Your Honor, could I suggest [inaudible] I think is file this complaint by around the first of January. Could I suggest that we have until the 20th to submit something in writing to the Court as to what our position will be in light of [inaudible]?

THE COURT: Sounds pretty reasonable.

MR. HAYES: We would not object to that.

THE COURT: Then let's do that. So the motion will just remain -- I don't know what category it goes into under our new electronic case filing system. We'll figure that out. Well, does it make sense then for submissions to be made January 20th and then have a conference shortly after that or should I even gather everybody together? I mean in a sense just coming here -- for everybody to come down is sort of a costly undertaking too. Maybe I can just give you a chance to further your opposition and give the Government a chance to respond to that and then make a decision based on that because my guess is -- well, just thinking -- speculating there's probably going to be a motion to dismiss at least some portion of the new -- the amended complaint. I will know more about that by January 20th I suppose.

There could indeed be plenty of proceedings ongoing -- I guess what I'm saying is this. Let me try to be again a little bit more succinct. Once an amended complaint filed we'll be in my view in the same posture we were in before the dismissal. Some, more or less. A stay in place and a request to -- I don't say ignore the stay but a request to have a deposition notwithstanding that stay based on the age of the plaintiff -- of the witness.

So that's the posture I would see the motion at that point and I'm -- I think that's a reasonable way to proceed. The 20th for your papers; 30th for any opposition.

MR. HAYES: That would be fine, Your Honor.

THE COURT: Okay. I guess that pretty much brings us to a close, right, as far -- I won't schedule any further conferences right now. That will be done depending on further developments. So thank you very much.

MR. HAYES: Your Honor, if I can. Richard Hayes. One brief point and I apologize but I'll -- with perhaps one exception defendants' arguments were while the United States might disagree with those arguments we're within the lines but Mr. Wing made a point that the United States brought this case and litigating this case without any regard to expense, without any -- I don't have the exact words but something to the effect of the cost to the public or something like that. We just strenuously note our objection to that kind of reckless comment that has nothing to do with any of the merits of anything that we were here discussing, Your Honor.

THE COURT: Well, I don't recall that being -- I remember somebody saying that expenses is less of a -- at least monetary expenses less of a concern for the Government. I mean it's going to the Government's calculus because -- but on the other hand since the defendants are spending money -- that's the kind of expense that I would be focusing on in any event. I'm not going to make a judgment about whether the defendant or the plaintiff, the Government is acting in the best interest of the public or not. So to the extent that such a comment was made it doesn't really affect my decision. Not that -- I don't recall the comment being made but if it was it didn't resinate anyway.

All right. So thank you.

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I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Shari Riemer

Dated: January 6, 2008